STATE OF MICHIGAN

COURT OF APPEALS

GARY ALAN BERGERON AND CAROL JOY BERGERON,

Plaintiffs-Appellants,

v

CENTRAL MICHIGAN LUMBER COMPANY, a Michigan corporation, and KEN LUNEACK CONSTRUCTION, INC., d/b/a BEAR TRUSS AND COMPONENTS,

Defendants-Appellees,

and

CENTRAL MICHIGAN LUMBER COMPANY, a Michigan corporation, and KEN LUNEACK CONSTRUCTION, INC., d/b/a BEAR TRUSS AND COMPONENTS,

Defendants/Third-Party Plaintiffs,

v

LEONARD MCINTOSH,

Third-Party Defendant/Appellee.

UNPUBLISHED
January 24, 2003

No. 237283
Ogemaw Circuit Court
LC No. 99-652809-NP

Before: O'Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

On September 28, 1998, plaintiff Gary Bergeron fell from a truss while in the process of building a pole barn on the property of Leonard McIntosh. At the time of the accident, Mr. Bergeron, Mr. McIntosh, and others were attempting to secure a truss manufactured by defendant Ken Luneack Construction, Inc., doing business under the assumed name of Bear Truss and

Components (Bear Truss). The truss was sold by defendant Central Michigan Lumber Company to McIntosh as part of a pole barn package. The truss in question was the first truss to be placed next to the gable end truss and was braced with a single 2 x 4 near the peak, with only one nail being used to secure the brace to the truss. Apparently the truss was not properly aligned, so Mr. Bergeron stepped onto the center chord near the peak and attempted to adjust the brace. The truss shifted and Mr. Bergeron fell to the ground, suffering multiple serious injuries.

Plaintiff and his wife, Carol Bergeron, filed suit against defendants, asserting that defendants were liable under several products liability theories, including breach of express and implied warranties, failure to inspect, negligence, and Mrs. Bergeron's derivative claim for loss of consortium. Plaintiffs alleged that plaintiff's fall and resultant injuries were proximately caused by a defective truss, which failed as a result of dry rot. Specifically, plaintiffs alleged that the dry-rotted wood was at a focal juncture where various web members of the truss were united using a gusset plate. According to plaintiff, when he placed his weight on the bottom chord of the truss, the rotted wood gave way, causing the plate to shift and plaintiff to lose his balance and fall approximately twelve feet onto his back.

To support this claim, plaintiffs relied on the opinion of their expert witness, Roswell W. Ard, Jr., who testified that the sole cause in fact of the truss failure was the use of dry-rotted wood as an internal web-member at its intersection with the crown plate gusset. At his deposition, Ard testified that while the bracing was inadequate, it was not a factor in causing the truss failure. Ard testified that he would expect the truss to fail in the same manner if it were built without the web-member; he surmised that if the inner web-members were removed and a 700 or 800 pound load was placed on the bottom chord, he would expect the truss to fail. When asked whether his opinion would change if a similar truss was manufactured without the internal web-members, a load was placed on the lower chord, and no failure occurred, Ard answered affirmatively:

> *Q*. [Mr. Collison, counsel for defendant Bear Truss] If I were to have Bear Truss make one of these trusses without those web members and, say, pile five or six guys on there and the bottom chord didn't fail, would you agree with me that your testimony here today probably isn't based – or probably isn't accurate? Let me stop there.
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> *A*. [Mr. Ard] If I understand the question correctly, were [sic] talking about fabricating a truss, same grades of woods, same gusset plates, exactly the same as this truss we have been discussing this afternoon with the exception of the two inner web-members are removed and then placing five or six reasonably sized people in the center there?
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> *Q*. That's right.
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> *A*. And if it did not fail, would that –
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> *Q*. *Would that change your opinion*? Let's do it that way.

A. Yes it would.

Q. It would change your opinion that the dry rot was the cause of the fall?

A. Well, I have already stated previously that the dry rot being there is the same as not having that web there.

Q. Okay. So what you're saying, then – just so I'm absolutely certain – that if I were to have Bear Truss build one of these and the web-members are cut or not put in to begin with or something along that order and let's say 800 pounds of men stand on the bottom chord, *then your opinion would be plain wrong as to how this accident occurred*?

A. Yeah. Assuming they're located in the central part of the truss, yes, I would agree with that.

* * *

Q. Let me ask you this: Seriously, if I built one of these trusses and I cut the middle out of these things or I didn't put them in to begin with and I put a 200 pound man where Mr. Bergeron was standing or testified that he was, that bottom chord, in your mind, would fail, no question about it?

A. Correct. [Emphasis added.]

On June 22, 2000, following Mr. Ard's deposition, defendant Bear Truss' expert witness, Dr. Isaac Sheppard, Jr., undertook an experimental demonstration recreating the conditions complained of by plaintiffs. He built an exemplar truss with a portion of the internal web-members removed, as described during Mr. Ard's deposition testimony, *supra*. With the two internal web-members having been effectively rendered nonstructural, a load of 675 to 700 pounds was placed on the bottom chord without any failure of the truss.

Defendants thereafter moved for summary disposition pursuant to MCR 2.116(C)(10) based in pertinent part on plaintiffs' failure to establish that the allegedly dry-rotted web member was a proximate cause of plaintiff's injury. In support of their motion, defendants submitted the deposition testimony of both parties' expert witnesses, photographs of the truss taken shortly after the accident, a videotape and photographs of Dr. Sheppard's experiment, and his accompanying written report. Dr. Sheppard opined that the truss in question was properly designed and fabricated but had been improperly braced, and when plaintiff moved onto the truss and pulled out the single nail holding the brace or it split away, the truss rotated away from the gable, causing plaintiff to lose his balance and fall.

In response to defendants' motion, plaintiffs submitted portions of the deposition testimony of certain eye witnesses to the incident, including both plaintiffs and Robert Brown, who was on the other end of the truss when plaintiff fell. These witnesses testified that when plaintiff put his full weight onto the truss, within seconds they heard the wood crack and saw the bottom cord shift, causing plaintiff to lose his balance and fall. In addition, plaintiffs also presented the deposition testimony of Lloyd Beaver, a licensed contractor who was not present at

the time of the incident but later examined the truss. He opined that the failure of the web member at the crown gusset would cause the person standing on the bottom chord to lose his balance and fall.

Following oral argument, the trial court granted defendants' summary disposition motion, concluding in pertinent part that plaintiffs had presented no admissible evidence from which a reasonable trier of fact could find that the allegedly defective web-member was a proximate cause of plaintiff's injury.[1] Plaintiffs now appeal.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Id*. See also *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996); *The Detroit News, Inc v Policeman & Firemen Retirement System of the City of Detroit*, 252 Mich App 59, 66-67; 651 NW2d 127 (2002). A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). *Maiden*, *supra* at 121. The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial. *Id.*

"A plaintiff bringing a products liability action, under either a negligence or a warranty theory, must show that the defendant supplied a product that was defective and that the defect caused the injury." *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 399; 586 NW2d 549 (1998), citing *Mulholland v DEC Int'l Corp*, 432 Mich 395, 415; 443 NW2d 340 (1989). As part of its prima facie case, a plaintiff must show that the defect attributable to the manufacturer was a proximate cause of the plaintiff's injuries. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). Establishing proximate cause entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as "proximate cause." *Id*. at 162-163. The former element requires a showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. *Id*. Legal cause, on the other hand, involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for such consequences. *Id*. The establishment of cause in fact is a necessary predicate to consideration of the issue of legal cause. *Id*.

A plaintiff may establish the requisite causal link in its products liability case by either direct or circumstantial evidence. *Id*. at 163; *Metalux*, *supra* at 399. However, a plaintiff's proofs in this regard must constitute reasonable inferences of causation, not mere speculation:

> [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient

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[1] Thereafter, plaintiffs' motion for reconsideration was denied and an order for dismissal of the third-party complaint was entered by the trial court.

> to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.
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> "All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty. Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy where the chain of circumstances leads to a conclusion which is more probable than any other hypothesis reflected by the evidence. However, if such evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established." [*Skinner, supra* at 164-167, quoting 57A Am Jur 2d, Negligence, § 461, p 442.]

In the instant case, we agree with the trial court that in the procedural posture of summary disposition, plaintiffs have failed to adequately establish a genuine issue of causation. The issue presented to the trial court was whether the allegedly inferior wood used as a truss web-member was a proximate cause of plaintiff's injuries. Although plaintiffs' expert witness, Roswell Ard, opined that the sole cause in fact of the truss failure was the use of dry-rotted wood as an internal web-member and that the truss did not shift due to inadequate bracing, he also admitted that his opinion would be wrong if it was demonstrated that the truss would not fail in an experiment such as the one conducted by defendants' expert, Dr. Sheppard. In fact, the experiment conducted by Dr. Sheppard indicated that a properly braced truss will not fail even in the event the truss was constructed with an inferior web-member. Thus, even assuming the truth of plaintiffs' allegation that the gusset plate separated before the truss rolled over or shifted, Dr. Sheppard's demonstration showed that the truss would not have collapsed if it had been properly braced. Consequently, Mr. Ard's causation theory was refuted and deficient because it lacked a basis in established fact.[2] *Skinner, supra* at 174.

Plaintiffs have failed to present any other admissible evidence to establish that the alleged defect in the truss was a cause in fact of the incident. Mr. Ard testified that he reviewed the plans for the truss and did not have any criticisms regarding its design. He also disagreed with Dr. Sheppard's opinion that this incident was due to improper bracing utilized by the project owner. According to Mr. Ard, this incident was not caused by improper bracing, although he did acknowledge that a truss will lose its structural strength if it is not in plumb, and, in fact, the exemplar truss did not fail when properly braced.

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[2] Our review of the record indicates that plaintiffs did not contest the admissibility of the evidence concerning the test results and experiment conducted by defendants' expert. See, generally, *Jenkins v Frison Building Maintenance Co*, 166 Mich App 716; 421 NW2d 275 (1988).

Plaintiffs' reliance on the proffered testimony of lay witnesses to establish a question of fact regarding causation is, in this instance, misplaced. These eyewitnesses testified that when plaintiff stepped onto the truss, they heard the sound of cracking wood and saw the truss shift. However, their testimony regarding causation was premised on mere conjecture and possibilities; these witnesses were unable to offer, and in fact were not qualified to render, an opinion regarding the structural integrity of the wood truss that was allegedly manufactured with a web-member that contained dry rot. See, generally, MRE 701 and 702. Plaintiffs' citation to portions of the deposition testimony of defendants' expert as purportedly supportive of their theory of causation is flawed, because such testimony pertained to hypothetical questions and was not based on the actual factual circumstances of the case.

In sum, we conclude that the trial court properly granted summary disposition in favor of defendants. As the *Skinner* Court noted, *supra* at 172-173, "causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment."

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey